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# Essays

## The Legal Codes of Ancient Israel\*

Michael Walzer

### I

Notice the plural form: it is not only that the bible contains many laws, but also and more importantly that it contains three different legal codes. The many laws are easy to understand, and it is equally easy to understand the popular wish that the yoke of the covenant be less onerous. An old folktale claims that on the day after the Sinai revelation, the Israelites rose early and marched at double speed away from the mountain so that they would not be given any more laws.<sup>1</sup> This did them no good. Through history the laws kept piling up—not, however in the form of explicit additions and revisions to the covenant code, Exodus 20-23, but in the form of two new codes: the holiness code of Leviticus and the Deuteronomic code. Each of these is described as if it too had been delivered at Sinai, and yet no sustained or systematic effort is made, early or late, not even at the time of canonization, to harmonize Leviticus and

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\* © Michael Walzer, 1992. This essay was first presented as the Robert Cover Memorial Lecture at Yale Law School in November, 1991. I am grateful to the commentators who joined me on that occasion and to the editors and manuscript readers of this journal for many helpful suggestions. Biblical citations follow the form of *Tanakh: A New Translation of the Holy Scriptures According to the Traditional Hebrew Text* (Philadelphia: Jewish Publication Society, 1985) with some modifications.

1. Louis Ginzberg, *The Legends of the Jews*, trans. Henrietta Szold (Philadelphia: Jewish Publication Society, 1910), 3: 242.

Deuteronomy with Exodus. The three codes are significantly different in the range of social activities that they cover, the style in which they are written, and the substantive rules they establish. Yet all of them are divinely commanded by the same God. There has not been a succession of gods, each with his own law, as in other countries of the ancient Near East there was a succession of kings promulgating new and different legal codes, the most recent one replacing the one before. How can difference be explained when a single divine lawgiver rules eternally?

Trying to answer this question will lead me to ask a number of others, focused on the biblical writers' understanding of the law. I am less interested in the laws themselves with all their prescriptions and prohibitions than in the legal culture of ancient Israel, insofar as this can be read out of the biblical texts (we have no other sources, no court records, no independent accounts of procedures or cases). What emerges from the texts is a picture of a culture unusually pluralistic and a set of laws less subject to sovereign power and professional specialization than our own. The argumentative legalism of classical and medieval Jewry has its origins here—in the biblical codes and in the efforts of men and women, over many years, to live by them or to revise or escape them. But it is only the origins and not the later development that concerns me in this essay. For there is much to be learned from Israel's singular revelation, delivered by one divine lawgiver, recorded and preserved in three versions.

The documentary thesis provides an historical explanation of this "tripleness," which in its most general form I am inclined to accept: the three codes represent three different traditions, oral or written, dating from different periods, transmitted by different groups, brought together at some late date by unknown editors. I will draw upon this thesis in the course of my own argument, but it does not answer what is surely the hard and interesting question. Why were the different traditions *brought together*, set side by side, rather than serially replaced or rewritten and harmonized? How can we explain the survival of all three?

From a theological point of view, the three codes are literally inexplicable—and that is why the differences among them are never acknowledged in the text. No human lawmaking is recognized; hence there are no stipulated procedures for adding to the divinely revealed law or for revising it, let alone for replacing it. The rule of Deuteronomy 4:2, "You shall not add anything to what I command you or take anything away from it, but keep the commandments of the Lord," applies also, in principle, to the covenant code of Exodus and ought to have precluded the writing of Deuteronomy itself. And yet the writing went on and, as Michael Fishbane has demonstrated in an immensely learned study of "inner-biblical legal exegesis," argument, interpretation, and revision, in

law courts and scribal schools, went along with it.<sup>2</sup> As soon as the first code was made known, a process began of adding and subtracting. In a sense, this is an entirely normal process of adaptation to social change. But since it is an unacknowledged process, it cannot have an acknowledged outcome. The adding and subtracting is surreptitious, and the result is a “divine word” inconsistent with itself.

It may well be, as some scholars think, that Deuteronomy was intended by its authors to replace earlier formulations of God’s law—a self-conscious attempt to provide a new and alternative text.<sup>3</sup> In fact, the authors provided an additional text, which does not supplant but rather co-exists with the earlier versions. The case is the same here as in the historical writings: the authors of Chronicles probably meant to replace the books of Samuel and Kings with their own expurgated history, heavily emphasizing the temple cult and the role of the priesthood. They must have hoped for readers who would find only their account available. But what they got from the beginning were readers like ourselves, for whom Chronicles is simply *another* account, oddly different from Samuel and Kings, but co-existing with it and laying claim to the same authority. The written history of God’s people, like the codifications of God’s law, cannot be supplanted. Each version pretends to be the only one, even though the quickest reading of the bible as a whole exposes the pretense.

The failure of every attempt at replacement and the piling up of different versions of law and history give the bible its special character. It is as if God presides over and therefore validates the different versions and also, necessarily, the disagreements they reflect. The disagreements cannot be openly recognized, but they also cannot be harmonized or written out of the text. They make further exegesis imperative since legal decisions and political and religious policies have to be justified in textual terms. New exegesis gives rise in turn to new disagreements. And again, because they cannot be acknowledged, the new disagreements also cannot be resolved.

The biblical text camouflages, as Fishbane writes, “the dependence of the divine word upon its human transmission and interpretation.”<sup>4</sup> The camouflage conceals the divergence of interpretations and it also conceals the identities, the proper names and the social location, of the rival interpreters. Though we know the names of all the high priests and some of the royal scribes, the authors of the priestly code and of Deuteronomy are necessarily anonymous: officially, as it were, they do not exist. And

2. Michael Fishbane, *Biblical Interpretation in Ancient Israel* (Oxford: Clarendon Press, 1985).

3. Joseph Blenkinsopp, in *Wisdom & Law in the Old Testament: The Ordering of Life in Israel and Early Judaism* (Oxford: Oxford University Press, 1983), 94, argues that Deuteronomy represents the first effort to create a “canonical” text—that is, a text that becomes the sole basis of continuing commentary and interpretation.

4. Fishbane, *Biblical Interpretation*, 272.

because the interpreters cannot be identified, they cannot be ranked; it is not possible to establish the authority of some of them over others. So far as the text is concerned, the only author is God himself. But behind this God, covered by his authority and speaking in his name, stands a host of human authors who make the law by writing, reading, commenting on, and applying it. Priests, judges, scribes, and prophets: only the last of these tell us who they are and announce a new divine word; the others (the prophets, too, most of the time) read and revise the old words. No one has a monopoly on the production of new legal versions. Or, better, God's monopoly works against the consolidation of interpretive power in Israelite society and serves to legitimize the plurality of interpreters. These are the secret legislators of Israel. Had there been no doctrine of the divine word, their work would probably have been normalized, and some political or religious group would have seized control, establishing a monopoly on legal interpretation. But there could be no normalization so long as denial and, except for the prophets, anonymity were religiously required.

Eventually, centuries after the last of the biblical texts were written, the rabbis managed to establish an interpretive (and even, on some accounts, a legislative) monopoly—occasionally challenged, as by the medieval Karaites, but wonderfully effective over many years and across most of the diaspora. But this achievement depended on the claim that the law was now a human possession, no longer God's to give. Citing a line from Deuteronomy, the rabbis declared that "it is not in the heavens" (30:12), that is, its meaning had to be determined here on earth, by a majority of this or that rabbinic court.<sup>5</sup> What the Deuteronomic authors meant by this line, however, was something very different. They wanted to say that the law was easy to know, readily available not for interpretation but for obedience. One had only to study their text. They did not give the law an earthly location in order to justify their own legislative activity, for they did not, could not, acknowledge that activity. And therefore they could not prevent other people from doing—so long as the doing was denied—what they had done.

## II

Hence the three codes (and many scattered examples of independently announced law and legal exegesis)—all of them equally valid and simultaneously in force. The earliest is the covenant code of Exodus, which was probably, in one form or another, the law of the tribal confederation and the first kings.<sup>6</sup> Like the other codes, this one is nothing like a com-

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5. Baba Metzia 59b.

6. For an argument about the three codes and their probable historical settings, see Blenkinsopp, *Wisdom and Law*, chapters 4 and 5.

plete set of laws, and scholars have as yet found no principles of inclusion or arrangement. Leviticus is mostly new law, though its central section, the “holiness code” of chapters 19-25, goes over much of the ground covered in Exodus. The intense concern with sacrifice and purity suggests priestly authorship; the work was probably begun in the days of the first Temple but not finished, so most scholars claim, until the second Temple had been built and its cult established. It seems clear, though, that whoever wrote Deuteronomy knew many of the laws recorded in Leviticus, which must have existed in some earlier version by the seventh century. If Deuteronomy is, as Moshe Weinfeld has argued, the work of royal scribes (or of some group of scribes patronized by reformers in the court), then we have to imagine two contemporary but rival schools of secret legislators, writing new laws, revising old laws, and claiming that their work, too, had been delivered by God to Moses at Sinai.<sup>7</sup>

Deuteronomy is the crown of Israel's law: so, at least, academic commentators commonly conclude, sensing, perhaps, that the book is the work of writers rather like themselves. Principles of inclusion and arrangement are no more evident here than elsewhere,<sup>8</sup> but the book as a whole has the form of an intellectual composition, elaborately rhetorical, somewhat verbose, didactic, and—the anachronism is useful—ideological. Leviticus reads like a record of priestly practice, no doubt idealized. Deuteronomy is more programmatic, aiming self-consciously at religious and perhaps also at political reformation. Its laws have been called prophetic, humanitarian, secular, liberal, redistributive, and even feminist—though many of them seem remarkably unsuited to such adjectives. In any case, if Exodus is the law of the tribes, and Leviticus the law of the temple, Deuteronomy is the law of the nation or, more specifically perhaps, of the royal court and the capital city, which stand for the nation. We might think of it (anachronistically, again) as one of the earliest examples in Western history of the work of urban intellectuals.

It has often been said that Israelite law—the three codes taken together—is more “advanced,” that is, more humanitarian, liberal, and so on, than that of other ancient peoples. Something like this is, indeed, the claim of the Deuteronomists themselves, who have Moses ask the assembled Israelites: “And what great nation has laws and rules as righteous as all this law that I set before you this day?” (Deut. 4:8).<sup>9</sup> Moses acknowledges here that other nations have legal codes, even if these are

7. Moshe Weinfeld, *Deuteronomy and the Deuteronomistic School* (Oxford: Clarendon Press, 1972), 179-89.

8. This has not deterred attempts to find or invent ordering principles that will account for the text as we have it. See, for example, Calum M. Carmichael, *The Laws of Deuteronomy* (Ithaca: Cornell University Press, 1974).

9. The text reads as if the author has a comparison or even a set of comparisons in mind, but it is impossible to say what other nations he is thinking of. For a modern comparison, arguing to a similar conclusion, see Léon Epsztein, *Social Justice in the Ancient Near East and the People of the Bible*, trans. John Bowden (London: SCM Press, 1986).

less righteous than Israel's; the others are not barbarians, like Kipling's "lesser breeds without the law." But they do not apparently receive their law directly from God. The seven Noachide laws are an invention of the rabbis. Except for the commandment of Genesis 9:6—"Whosoever sheds the blood of man, by man shall his blood be shed: for in His image did God make man"—there is no biblical account of a divine revelation to humankind generally or to the "nations," but only to Israel. Curiously, it is just this universal law against murder, as Moshe Greenberg has shown, that distinguishes Israel's criminal code from all the others that we know of in the ancient world. The other codes allow for monetary compensation in cases of murder, while the bible insists on capital punishment.<sup>10</sup> Whether this is more righteous or more humanitarian is an open question, though the apparently related refusal of biblical legislators to punish crimes against property with death is certainly likely to appeal to modern readers.

In any case, the discovery and translation of more and more legal codes from both Mesopotamia and Asia Minor requires us to be skeptical of all apologetic and moralizing comparisons. It seems to be true that the rhetorical stress on social justice that marks the biblical codes has no precedent elsewhere—and the power of the prophetic writings, denouncing injustice, is also unequaled among Israel's neighbors: at least, nothing so strong has yet been found. Yet the substance of the biblical laws, especially the laws dealing with family and economy, is not in any sense singular or original; Israel's legislators were clearly working within a common Near Eastern legal tradition. The protection they provided for the weak—slaves, strangers, women—is sometimes greater than that provided in other ancient codes, sometimes not. The penalties they prescribed for violations of the laws are sometimes more lenient, sometimes more harsh. Social differentiation is considerably more rigid in the Babylonian laws than it is in Israel's, but national differences were more significant in Israel than in Babylonia.

### III

What is special about biblical law is not its substance but its sources and its presentation. I have already said something about divine provenance and the unexpectedly pluralizing effects of God's sole authorship. But there is also a more narrowly political point to be made about divine revelation—and then two points about the textual presentation of the law.

First, Israel's law is God's alone; it has no other possessive modifier.

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10. I follow here the argument of Moshe Greenberg, "Some Postulates of Biblical Criminal Law," in Frederick Greenspahn, *Essential Papers on Israel and the Ancient Near East* (New York: New York University Press, 1991), 333-52.

Above all, and in contrast to all the other Near Eastern codes, it is not the king's law. Despite the rich narrative accounts of Israel's monarchic period, writes Martin Noth, "we nowhere hear of the law-giving activity of the kings."<sup>11</sup> Nor is the law ever described as the work of an assembly of elders; nor, again, as a priestly codification, or a philosophical construction, or a judicial invention. Justice Holmes's maxim, that law is what the judges say it is, may in fact apply to ancient Israel as well as to modern America, but it would have been a literally inadmissible proposition among biblical writers. Politically, this means that everyone—kings, elders, priests, judges—is subject, indeed equally subject, to the authority of the law. This is a matter of principle. The actual power relations prevailing in the community at any given time, of course, qualify or distort the expression of the principle. Nonetheless, principles are important, as we can see from the story of Ahab and Naboth in I Kings 21.

Ahab, who rules the northern kingdom of Israel, covets the vineyard of Naboth, which adjoins his palace grounds. He proposes to buy it, offering a "better vineyard" or a money payment. Naboth refuses, saying "The Lord forbid that I should give up to you the inheritance of my fathers." Ahab can do nothing: he goes home "dispirited and sullen," takes to his bed, turns his face to the wall. His wife, Jezebel, a Phoenician woman who worships Baal rather than Yahweh and does not know or respect Israel's law, contrives Naboth's murder. Ahab then seizes the vineyard and is confronted by the prophet Elijah, demanding "Would you murder and take possession?" (I Kings 21:19). It is a wonderful scene, but I am more interested in Ahab's dispiritedness than in Elijah's righteous anger. The king implicitly acknowledges the laws of land tenure and thinks himself constrained by them. No way of changing the law is available to him.

The only people who might openly challenge and change the law are the prophets, who claim a direct relation to God. Moses, the first prophet, with the most direct relation, does add to the law he originally delivered—but only by bringing a case "before the Lord" (Numbers 27:5) and waiting until "the decision of the Lord should be declared" (Leviticus 24:12). The first of these passages is especially interesting because the case in question is initiated by the "daughters of Zelophehad," who speak before the congregation of Israel defending their right to inherit their father's land. God tells Moses that their plea is just and commands him to announce a new inheritance law.<sup>12</sup> The daughters seem more important here than the prophet, and the scene in which they appear suggests how the narrator views the accessibility of legal procedures and the popular character of legal argument. But the

11. Martin Noth, *The Laws in the Pentateuch* (London: SCM Press, 1984), 14.

12. But the daughters' victory is later compromised. See Numbers 36, and the discussion in Fishbane, *Biblical Interpretation*, 98-99, 104-05.



law is never again disputed so publicly. Nor did the later prophets have the authority to revise it in this open way.

Indeed, I know of only one passage in all the prophetic writings that seems to set the living word of the prophet against the written law. Here is Jeremiah speaking to the people of Jerusalem:

How can you say, "We are wise,  
And we possess the law of the Lord"?  
Assuredly, for naught has the pen labored,  
For naught the scribes!  
The wise shall be put to shame,  
Shall be dismayed and caught;  
See, they reject the word of the Lord,  
So their wisdom amounts to nothing (8:8-9).

These lines are both unusual and obscure: there is no specific "instruction" of the scribes that the prophet denies or cancels. He is probably more concerned with scribal wisdom than with the legal code. A better example of the prophet's relation to the law is provided by Jeremiah 17:21-22, where the laws of the Sabbath are amended or, as Jeremiah claims, elaborated: "Guard yourselves . . . against carrying burdens (or merchandise) on the Sabbath day, and bringing them through the gates of Jerusalem." No prohibition of "carrying" is recorded in the three codes.<sup>13</sup> But Jeremiah quickly adds: "Hallow the Sabbath, as I commanded your fathers," thus reading his amendment back into the original law. The prophet too is bound by the law; he cannot play the part of Max Weber's charismatic leader who proclaims: "The law is thus and so, but I say unto you. . . ." Still, prophets do change the law without acknowledging what they are doing; and so do priests and scribes and judges. Kings cannot even do that; they can only break the law. They can put their hands on it, violently, but they cannot leave their intellectual or moral mark on it.<sup>14</sup>

#### IV

The second distinctive feature of Israelite law is its radical embeddedness in a historical narrative. It is as if our own criminal and civil law were available to us only in repetitious but always slightly dissimilar passages interspersed throughout a history of the American Revolution. This historicism in part determines, in part qualifies, the law. Since the biblical narrative stretches only from the exodus to the conquest, Israelite kings play no part in it and, except for Deuteronomy 17, which anticipates and regulates kingly rule, they make no appearance in the legal

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13. The case from Exodus 16:17-20 and Numbers 15:32-36 has to do with "gathering," not carrying.

14. One "statute" having to do with the equal division of booty is attributed to David in I Samuel 30:25, but this was before David became king.

texts. So it is not surprising that they are not among the acknowledged or even the unacknowledged interpreters of the law. Solomon is celebrated for wisdom, not legal knowledge. The account of deliverance from Egyptian slavery is the textual setting for an anti-authoritarian and a justice-oriented legalism. Future generations of Israelites are enjoined not only to study the law but also to retell the history. The legal texts refer regularly to the historical narrative and so invite interpretation in its terms. Hence the special force of the commandments about slaves, strangers, the poor and needy, widows and orphans. Babylonian and Assyrian kings, in the preambles to their own law codes, insist upon the protection they offer to these same groups, perhaps with reason. Yet this is *noblesse oblige*, the special task of the mighty. In Israel this task seems to be democratized; at least, it is rooted in a common experience of oppression and therefore available for democratization. When Amos, for example, denounces the practices he calls “grinding the face of the poor,” he addresses himself to all Israel, not to the leaders of the community.

I hasten to add that the experience of Egyptian bondage did not lead Israelite legislators to abolish slavery. According to the covenantal and Deuteronomic codes, Hebrew slaves cannot be held longer than six years, a rule that effectively turns slavery into a form of limited indenture (Exodus 21:2-6; Deuteronomy 15:12-18—these two texts differ with regard to female slaves, a point I will come back to below). Nothing is said in either code about foreign slaves, however, for whom the seventh year presumably brings no release. Leviticus is explicit in permitting the permanent enslavement of foreigners: “they shall be your bondmen forever” (25:46), which must be the way Egypt’s pharaoh thought about the children of Israel. Curiously, the Levitical standard for the treatment of the Israelite “bondman” is set by what appears to be an ethnically undifferentiated class: he is to be treated “as a hired servant and a sojourner.” He must serve and sojourn, however, for forty-nine years, until the jubilee, rather than for only six years from the date of his purchase. He cannot be treated as harshly as a (foreign) slave since he belongs, along with all “free” Israelites, to God. Deuteronomy also recognizes the interethnic class of “hired servants” (wage workers) and explicitly demands equal treatment for all its members: “You shall not oppress a needy and destitute laborer whether a fellow countryman or a stranger. . .” (24:14). Here the experience of Egyptian bondage is given a general application: “But you shall remember that you were a slave in Egypt.” The Deuteronomic commandment not to return a fugitive slave (“He shall dwell with you in any place which he may choose. . .” [23:16]) seems also to apply to foreigners, though scholars disagree about its exact

meaning.<sup>15</sup>

## V

The differences among the laws of slavery suggest an extended and serious argument—entirely appropriate in a community with a shared memory of bondage. The argument must have been as much about the experience as about the laws themselves: what moral and legal consequences followed from the remembrance of Egypt? What did it mean to be a vassal nation, a community of divine servants? To answer questions like these was to justify one or another understanding of the laws. And this brings me to the third distinctive feature of Israel's codes: many of the laws that they include are laws-with-reasons, justified laws. Nothing like this appears in any of the other Near Eastern legal codes. The great kings of Mesopotamia did not have to provide arguments for their laws. Nor, of course, does God. Many of God's laws, like theirs, are delivered without justification and seem—some of the laws of holiness and purity provide the clearest examples—entirely arbitrary. But the social and economic laws often come with reasons attached. Sometimes these refer directly to the historical narrative: "You shall not oppress a stranger: for you know the feelings of the stranger, having been strangers in the land of Egypt" (Exodus 23:9). Sometimes the justifications appeal to a more ordinary morality or, simply, to common sense:

If you . . . take your neighbor's garment to pledge [i.e. as a pawn], you must return it to him before the sun sets. It is his only clothing, the sole covering for his skin. In what else will he sleep? (Exodus 22:26-27).

When you build a new house, then you shall make a parapet. For your roof so that you do not bring bloodguilt on your house, if anyone should fall from there. (Deuteronomy 22:8).

The distinction between justified and unjustified law is, from a theoretical perspective, far more interesting than the more standard scholarly distinction between casuistic and apodictic law. Scholars have argued that the case law is common to the bible and other ancient codes while the sharp imperatives of the apodictic form ("Thou shalt not . . .") are more likely to be unique to Israel. But this is much disputed and of uncertain significance even if true. What David Weiss Halivni has called "the Jewish predilection for justified law," if it exists, is genuinely more important.<sup>16</sup> In the biblical texts, the predilection is only intermittently displayed. The reiterated phrase of Leviticus, "for I am the Lord your

15. Jewish commentators commonly assume that the fugitive is a foreigner. See, for example, Ramban (Nachmanides), *Commentary on the Torah*, trans. C. B. Chavel (New York: Shilo, 1976), 5: 287-88.

16. David Weiss Halivni, *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law* (Cambridge: Harvard University Press, 1986).

God,” may provide a motive for obeying the laws, but it cannot be said to provide a substantive justification of their content. Laws-with-reasons appear often enough, however, to call for an explanation: what is the reason for the reasons? One possible answer to this question is the strength of the covenantal idea. Because the covenant requires the people’s consent, we might say, the laws must be justified. Even though the people have already given a “wholesale” consent—all that the Lord has spoken “we will obey” (Exodus 20:16)—Israel’s legislators seem unwilling to rely entirely on that. They seek in addition something more specific and particularized, as if they have in mind a genuinely consensual community whose members know exactly what they are doing and why.

Yet perhaps the legislators are giving reasons first of all to one another and only incidentally to other members of the community. Another explanation of the justifying clauses in the biblical codes is that they reflect the actual discussions that went on within priestly or scribal or judicial circles. They are the textual residue of oral advocacy—of what was actually said in defense of legal reform and revision. The argumentative style of rabbinic law stands, I would suggest, at the end of a continuous development that has its beginnings here. But the beginning is very different from the end—and much harder for us to understand. How can we reconstruct the mind-set that governed the earliest Israelite legal arguments? Whatever the sophistication and, as modern readers are likely to think, the humanism revealed in the laws such as that of the pledge, biblical legislators were clearly open, as the rabbis generally were not, to the idea of direct divine intervention. When God intervened through the mysterious *urim* and *thummim*, for example, he did not give reasons. The word *torah*, which usually means instruction, testimony, law, or decision, also means oracle. Both priests and prophets delivered oracles, often unclear and always unargued. Like the answers to specific questions provided by the *urim* and *thummim*, these usually have to do with policy, not law. They are pronouncements about the future, warnings and foretellings, not legal rulings. Still, biblical law was worked out by people who believed in the warnings as well as the rulings, who had a sense of God’s mysterious immediacy that was largely lost by the rabbinic age. The rabbis, some of them anyway, were openly skeptical about the possibility and even the desirability of divine intervention in their decision-making.

Mind-set aside, however, laws-with-reasons are not mysterious. Whether they are aimed at fellow or rival lawmakers or at ordinary citizens, they aim to persuade. From this aim, two things seem to follow about the biblical understanding of the law. First of all, this is not in any simple sense a legal positivist understanding. No doubt, God’s law is authoritative because God is omnipotent, the sovereign of the universe. But no particular rendition or interpretation of the law is authoritative

for this reason. Legal positivism “works” only when sovereign power is regularly and visibly deployed. But God’s deployments, despite his omnipotence, are irregular and usually invisible. Hence his authority is effectively taken over by Israel’s secret legislators. None of them (since the king is excluded) possess anything like sovereign power, and so they are led to think about the law as something that requires argument.

And if there are arguments, there must also be standards to which the arguments appeal. Justified law implies the previous existence of ideas about justification—in the case of civil and criminal law, of ideas about justice. It appears that God himself is bound by these ideas, as Abraham tells him at Sodom: “Shall not the judge of all earth deal justly?” (Genesis 18:25). If God’s power does not make law authoritative, neither does his righteousness make it just. The biblical writers were also not moral positivists. Moses’ boast in Deuteronomy about the value of Israelite law carries the same implication as Abraham’s rebuke: though the law is divinely delivered, divinely commanded, it does not determine but only realizes what is right. Or, alternatively, fails to realize what is right: for it is always possible that the reasons given for this or that law will be disputed—though never explicitly.

The effect of these disputes is, again, to pluralize the law. Old laws are not canceled, but rather new laws or revised versions of old ones are added. I have already suggested that the alternative process of replacement rather than addition characterizes other Near Eastern legal codes. Only among the Hittites, apparently, are the replacements made explicit (and only in a code without the usual royal preamble, perhaps designed for the use of jurists): “If someone blinds a free man or knocks out his teeth, formerly he would give one mina of silver, now he gives twenty shekels of silver and pledges his estate as security.”<sup>17</sup> No reasons for the change are given, either because ordinary Hittites had no need to know or because the legislative authority of the king or his judges was never in question. A lone passage in the book of Ruth (4:7—“Now this was formerly done in Israel. . . .”) reproduces the Hittite formula, though in the context of a case rather than a code. For the rest, additions and revisions are unacknowledged, and so, as with the Hittites, though perhaps for different reasons, mostly unjustified. We have to reconstruct the arguments that were probably made on the basis of justifications offered in other cases. But there is one very nice example of an addition with reasons attached.

In Exodus 21:2-6, it is required that a Hebrew slave be set free in the seventh year of his servitude. He shall “go out free, without payment.” The law is repeated in Deuteronomy with an important addition:

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17. H. W. F. Saggs, *Civilization Before Greece and Rome* (New Haven: Yale University Press, 1989), 167.

When you send him free do not let him go away empty handed. Furnish him out of the flock and threshing floor, and out of your wine press which the Lord your God has blessed you, you shall give him. Remember that you were slaves in the land of Egypt.

The historical reference is especially appropriate here since the Israelites did not “go away empty” from Egypt (see Exodus 12:35-36). Surely they should behave toward their own kinfolk at least as well as the Egyptians behaved toward them. But this argument was apparently not entirely convincing, for the Deuteronomic authors add another: “It shall not seem hard for you when you set him free . . . for he has been worth a double hired servant to you . . .” (15:18). Legal revisionism clearly involved economic as well as historical arguments.

Sometimes, it seems, these are also arguments of the sort that we would call ideological, arguments that reflect religious/political disagreements of a systematic kind. The slavery laws of Deuteronomy, for example, are clearly intended to improve the status of women, though the improvements are neither clearly marked out nor explicitly defended. The six year limit, from which women were excepted in the Exodus code, now covers them in exactly the same way as men are covered. Male and female slaves are to be similarly treated, though nothing is said against their dissimilar treatment in times past. An even more intriguing example of what has been called Deuteronomy’s “feminism” is the revision of the Tenth Commandment. This is the Exodus version:

You shall not covet your neighbor’s house, you shall not covet your neighbor’s wife, nor his manservant nor his maidservant, nor his ox, nor his ass, nor anything that is your neighbor’s (20:14).

And this is the Deuteronomic version:

Neither shall you desire your neighbor’s wife. You shall not covet your neighbor’s house, his field, or his manservant, or his maidservant, or his ox, or his ass, or anything that is your neighbor’s (5:21).

In the revised commandment, the wife is set apart, deliberately taken out of the list of possessions, assigned, as it were, a verb of her own. Again, no reason is given for the small but significant change; if there was a protest, as by the daughters of Zelophehad, we are told nothing about it. This, the text insists, is what God really commanded at Sinai. But it seems obvious that someone reading the earlier version of what God commanded did not like it. We can only imagine what he, or she, said to his, or her, fellow legislators.

## VI

The existence of three codes means that Israel’s legal tradition was pluralist in character, encompassing (with what degree of strain we do

not know) argument and disagreement. The “predilection for justified law” enables us to see what the arguments were probably like even if we cannot be sure of the settings in which they were made or of the people involved. Ancient Israel does not appear to have had any very developed conception of citizenship. The biblical texts provide no doctrinal defense of—they hardly seem to take an interest in—political participation. But there clearly was a “participatory” legal culture. I do not mean, necessarily, a culture of litigation, though access to the courts appears to have been easy and the judges fairly busy if not always fair in their business. The frequency with which they are criticized by the prophets suggests the everyday importance of their decisions. So does the commandment that comes at the very beginning of Deuteronomy, set apart from all the others: “You shall not be partial; but you will hear out high and low alike” (1:17). Babylonian and Egyptian judges were probably similarly enjoined; they do not seem, however, to have had to listen to anything quite like a jeremiad when they failed to live up to their responsibilities. But for our purposes here, litigation and judicial integrity are less important than legislation and interpretive authority.

Here is what gives Israel’s legal culture its distinctive—and, I might add, its enduring—character. From fairly early, a significant number of people, virtually the whole of the nation’s intelligentsia, such as it was, and some subset of its ordinary members, were engaged in arguing about the law. The fact that they assigned their arguments to God we can take as piety or as presumption. Either way, the assignment legitimized their own activity. In principle they were articulating the content of the Sinai covenant; in practice they were deciding—more than once—what that content should be. Certainly, the decision-making process was political (and moral) as well as legal. But it was never understood or defended in political terms. Nor are procedures specified by which individuals were admitted to the process. Priests were born to their tasks, but there were many priests, and some of them obviously played a greater role than others. Judges were appointed by the king, but the texts also suggest that the elders of the people, chosen, perhaps, by the people, served at least in the local courts. Prophets were called by God, but we have only their own accounts of their calling. About the scribes, we know nothing at all. These are the people I have called the secret legislators of Israel—an elite, no doubt, but a very loosely structured elite, whose covenantal/legal consciousness was probably not entirely different from that of the nation-at-large.

The looseness of the structure had something to do with the tripleness of the codes—and both of these had something to do with a divine singularity that could not be imitated or even authoritatively represented anywhere in Israelite society. None of this, needless to say, gave rise to a pluralist *doctrine*. No biblical writer argued for the legitimacy of rival

interpreters or of rival interpretations of the law. But as a group, the writers (authors, editors, scribes) left behind in the canonical texts a legacy of multiple and inconsistent codes and a record of unacknowledged interpretations and revisions. For reasons about which we can only speculate, they chose to live with this multiplicity, rejecting the two possible resolutions: serial replacement and editorial harmonization. The result of their choice was a written law that made possible those strange, open-ended legal conversations and arguments that constituted the oral law of later Judaism.



